

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No.180/00613/2017

Thursday, this the 1st day of March, 2018

CORAM:

Hon'ble Mr. U.Sarathchandran, Judicial Member
Hon'ble Mr.E.K.Bharat Bhushan , Administrative Member

Anoopkumar.M
 Assistant Office Superintendent (Phones) (ASO(P))
 CSC Pulpally, BSNL Pulpally, Wayanad-673 579
 (on transfer from MDF Elathur)
 S/o.Late Vasu, 'Soumiam'Elathur Post, Kozhikode,
 Pin 673 303) . . . **Applicant**

(By Advocate -Mr.T.M.Raman Kartha)

V e r s u s

1. Bharat Sanchar Nigam Limited (BSNL)
 (A Government of India Enterprise)
 Represented by the General Manager Telecom
 Kozhikode, Pin – 673 001
2. The Assistant General Manager (Admn)
 Office of the General Manager Telecom
 BSNL, Kozhikode, Pin – 673 001 . . . **Respondents**

(By Advocate – Mr.George Sebastian)

This Original Application having been heard on 21.2.2018, the Tribunal on 1.3.2018 delivered the following:

O R D E R

Per Hon'ble Mr. U. Sarathchandran, Judicial Member -

Applicant, an Assistant Office Superintendent in the BSNL, Kozhikode
 has come up with this Original Application being aggrieved by the refusal

of the respondents in considering him for not transferring from MDF Elathur, where he was working earlier, to CSC Pulpally, Wayanad. This is the third round of litigation he is undertaking for redressal of the above grievance. He has already joined CSC Pulpally where he has been transferred to.

2. He is challenging the transfer on the ground of the fact that he is the caregiver of a 40% visually disabled daughter. While relying on para 6(f) in Section A of Transfer Rules and Guidelines, applicant states that the respondents ought to have considered that factor while transferring him from MDF Elathur to CSC Pulpally.

3 Annexure A-1 is the transfer order dated 2.5.2017 issued by respondent no.1 transferring him from MDF Elathur to CSC Pulpally. After having submitted a representation for cancelling the transfer, he filed Original Application No.388/2017 which was disposed of by this Tribunal vide Annexure A-5 order. The order passed by this Tribunal in OANo.388/2017 reads:

“.... 2. Applicant has approached this Tribunal challenging Annexure A-1 order of transfer, by which he has been transferred from MDF Elathur to CSC Pulpally. It is submitted that the transfer is against Annexure A-5 transfer guidelines as per which those who have completed 55 years are exempted from transfer. The applicant is nearing 55 years. The learned counsel for the applicant further submits that the applicant has a physically handicapped daughter with 40% visual disability. Hence the present transfer order does an injustice to him, it is contended. Annexure A-4 representation submitted by the applicant is yet to be considered and disposed of.

3. In view of the aforesaid background, the first respondent is directed to consider and dispose of Annexure

A-4 representation submitted by the applicant at the earliest, at any rate, within a week from the date of receipt of a copy of this order. “

4 The respondent no.1 considered the representation mentioned in the afore-quoted order and issued Annexure A-6 communication not acceding to the request made by the applicant. The relevant portion of Annexure A-6 communication dated 27.5.2017 issued from the office of respondent no.1 reads:

“ His contention is that he is eligible for exemption from tenure transfer as he is attaining the age of 55 years. The transfer guidelines does not vest any right to any employee for claiming exemption from tenure transfer on the ground of attaining 55 years of age. It is pertinent to note that **Sri.Anoopkumar.M has not completed the age of 55 years as on 31.3.2017.** So the transfer guidelines cited by him has no relevance to the facts of this case.

Illness of a family member of an employee can not be claimed as a ground for exemption from tenure transfer. Similarly undergoing medical treatment is also not a valid legal ground for claiming exemption from tenure transfer.

Completion of 30 years of service is not a ground for implementing tenure transfer. Tenure transfer is implemented on the basis of seniority. Sri.Anoopkumar.M has not pointed out any specific case of violation of norms.

For the above reasons, the grounds raised by Sri.Anoopkumar are not acceptable. His representation is therefore is not considered.

Order of the Hon'ble Tribunal is complied with as above.

This order is issued with the approval of the General Manager Telecom, Kozhikode. “

(emphasis supplied)

5 Challenging Annexure A-6 communication, applicant again approached this Tribunal with O.A 451/17. After hearing both sides, this Tribunal passed the following Annexure A-7 order on 27.5.2017 :

“3. Today when the case was taken up learned counsel for the applicant has produced a certificate issued by the Medical Board constituted at the Taluk Headquarters Hospital, Vadakara indicating that the percentage of applicant's daughter visual disability is 40%, which is of permanent nature. Since Annexure A-6 transfer guidelines in respect of the respondent organization exempts an employee who is a care giver of a disabled child from the routine exercise of transfer/rotation transfer subject to administrative constraints, we feel that the respondents are obliged to take into account the aforesaid medical certificate issued by the Board.

4. Learned counsel for the respondents submitted that the applicant has already been relieved from Elathur and has joined Pulpally.

5. In the above circumstances, while setting aside Annexure A-1 communication dated 27.5.2017, **we direct the Respondent No.1 to consider the representation, if any, made by the applicant within ten days from today along with a copy of the certificate of permanent disability issued by the Medical Board of Taluk Headquarters Hospital, Vadakara and to pass appropriate orders in consonance with the transfer policy guidelines which gives exemption to the employees who are care giver of a disabled child, vide para 6 (i) of Section A of the transfer rules and guiding principles applicable for all employees.** A decision shall be taken by the Respondent No.1 on the aforesaid representation within fifteen days from the date of its receipt and shall communicate the decision to the applicant soon thereafter. “

(emphasis, ours)

6 In terms of Annexure A-7 order of this Tribunal, applicant again

approached respondent no.1 with Annexure A-8 representation dated 5.7.2017 which was again turned down by the respondents vide Annexure A-9 communication.

7 Annexure A-9 was issued by the first respondent's office with the following reasoning:

“ “Employee who is also a care given of disabled child may be exempted from the routine exercise of transfer/roational transfer subject to the administrative constraints. The work 'disabled' includes (I) blindness or low vision (ii) hearing impairment (iii) locomotor disability or Cerebral Palsy (iv) leprosy cured (v) mental retardation (vi) mental illness (viii) multiple disabilities and (viii) autism. “

BSNL Kozhikode BA covers two revenue districts, Kozhikode and Wayanad. There is scarcity of employees in Wayanad. Almost all employees are residents in Kozhikode district. The telephone exchanges and telecom offices in Wayanad district can not be operated only with the employees residing in Wayanad district. So, **for operating exchanges and telecom offices in Wayanad district, the services of employees residing in Kozhikode district is absolutely essential. But employees residing in Kozhikode district are not willing to work in Wayanad district. As functioning of telephone exchanges and telecom offices in Wayanad district is absolutely necessary, service of employees residing in Kozhikode district is unavoidable.** But employees residing in Kozhikode district are vehemently resisting transfer to Wayanad district. So, the BSNL administration, in consultation with the recognised staff organisations has devised a mechanism for transfer to Wayanad. According to this design, the employees who are below 55 years and worked in Kozhikode district continuously for a long period has to be transferred for two years as a tenure transfer and they will be re-transferred to Kozhikode district. **Thus the tenure transfer to Wayanad district is on the basis of long stay in Kozhikode district. As this is an agreed policy, no dilution was made to it till date. If any dilution is made, that will result in to closure of telephone exchanges in Wayanad district. So, there is absolute administrative constraints in transferring**

Sri.Anoop Kumar.M, to Pulpally, Wayanad district. Thus the said transfer is perfectly in consonance with para 6(i) of Section A of transfer rules. Hence the representation dated 5.7.2017 received from Sri.Anoop Kumar.M, can not be accepted. It is hereby rejected.

The order of the Hon'ble Tribunal is complied with as above.

Without prejudice to the above, the following irregularities are noticed in the representation of Sri.Anoop Kumar.M.

1. The address of Sri.Anoop Kumar.M, shown in the representation dated as 5.7.2017 is Assistant Office Supt. (Phones), MDF, Elathur. In fact he was relieved from Elathur office on 27.5.2017 and reported for duty at Pulpally Telephone Exchange on 12.6.2017. His joining in Pulpally exchange was brought to the notice of Hon'ble Tribunal. Hence the address shown in the request is incorrect, if not misleading.

2. **The certificate to prove the disability of his daughter is a photocopy of the certificate purported to have been issued from Taluk Head Quarters Hospital Vatakara. The said photocopy is not seen attested.** The unattested photocopy of a document has no validity in the eye of law. So this document cannot be treated as a valid certificate issued by a competent medical authority in accordance with the provisions of the PWD Act -1995.

3. Sri.AnopKumar.M is the father of the child stated to be with disability. His claim is that he is the care giver. This claim is not proved in any manner. **The child has mother to lookafter her. So sri.Anoopkumar M cannot be considered as an exclusive or sole caregiver of the girl child with disability.**

4. Section 2(t) of the PWD Act 1995 states that "Person with disability" means a person suffering from not less than 40% of any disability certified by a medical authority. **Section 2(p) defines the term "Medical Authority". The medical authority means any Hospital or instituion specified for the purpose of this Act (PWD Act-1995) by notification of the appropriate government. The term "Notification" is also defined in Section 2(s) of the Act. No evidence has been produced to prove that Taluk Head Quarters hospital Vatakara is a hospital specified for the purpose of the PWD Act- 1995.**

For the above reasons also the representation is not

acceptable. “

(bolding done by us)

8 The applicant has now approached this Tribunal to set aside Annexure A-1 order of transfer and Annexure A-9 communication and also for a direction to the respondents to exempt him from transfer and to relieve him to MDF Elathur.

9 The Original Application was resisted by the respondent mainly on technical grounds which are highlighted in the afore-extracted Annexure A9 epistle. While contending that they have complied with Annexure A-7 order of this Tribunal, the respondents state that the original or attested copy of the disability certificate was not given by the applicant at the time when Annexure A-8 representation was considered. According to them, the request for exemption from transfer was rejected on the ground of administrative constraints as stated in Annexure A-9. It is further stated by them that copy of the disability certificate produced by the applicants will not come within the purview of Clause 6(J) of Annexure A-3 transfer guidelines. Respondents pray for rejecting the Original Application.

10 We have heard learned counsel for the applicants and Shri.Jose Sebastian, standing counsel for the BSNL. Perused the records.

11 Para 6(i) and (j) of Section A in Annexure A-3 transfer rules and guiding principles states as follows:-

“ (i) Employee who is also a care giver of disabled child may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints. The word 'disabled' includes (I) blindness or low vision (ii) hearing impairment (iii) locomotor disability or Cerebral Palsy (iv) leprosy cured (v) mental retardation (vi) mental illness (vii) multiple disabilities and (viii) autism.

(j) The definition of disability for the purpose of clauses 6(h) & 6(i) above would be as notified by the Govt of India vide Persons with Disabilities (Equal opportunities, Protection of Rights & Full participation) Act, 1995 and another further amendments/clarifications issued by the Govt from time to time. “

12 At the time of hearing the Original Application, learned standing counsel for the respondents pointed out that as per the Rules framed under the Persons with Disabilities (Equal opportunities, Protection of Rights & Full participation) Act, 1995 only a certificate issued by the medical board constituted by the Government can be accepted for proving the disability. It appears from Annexure A-9 that the respondents rejected Annexure A-8 representation mainly on the ground that the certificate of disability produced by the applicant to prove the disability of his daughter is only a photocopy and not issued by the Medical Board. Annexure A-2 is the certificate issued by the Taluk Headquarters Hospital, Vadakara. The same certificate was produced at the time when O.A 451/17 was taken up for consideration. This Tribunal in Annexure A-7 order had taken into consideration of the aforesaid certificate for accepting the fact that the applicant's daughter is visually impaired with 40% disability of permanent nature. It is significant to note that there was no challenge of Annexure A2 certificate in O.A 451/17 and that Annexure A7 order of this Tribunal was not challenged in higher

judicial forums.

13 It appears that the same Annexure A2 certificate was produced by the applicant before respondent no.1 along with Annexure A-8 representation. However, respondent no.1 found fault of it by pointing out that it is not a valid and acceptable certificate as it is only a photocopy. As stated above, this Tribunal in Annexure A-7 order had taken into consideration of that certificate while issuing Annexure A-7 directions to respondent no.1. However, respondent no.1 was too eager to pick holes with Annexure A-2 certificate and went even to the extent of saying that only a certificate issued by the competent medical board is acceptable. It has to be noted that the applicant is relying on Annexure A-2 certificate not for securing employment for his daughter. Annexure A2 is intended only to point out the fact that the daughter is a visually impaired person with 40% disabilities and on that account the applicant be given the benefit of exemption from transfer as the caregiver of a disabled child. However respondents in the same breath say that the child's mother can look after her in the absence of the applicant! This is, to say the least, a pusillanimous reasoning.

14 Respondent no.1 had been playing smart and was too eager to nit-pick the judicial orders rather than being compassionate to the applicant who is the parent and caregiver of a visually handicapped girl child. This Tribunal wonders why the applicant no.1 had become too insensitive to such considerations which the authorities while framing Annexure A-3 transfer order and guidelines had been careful to incorporate reckoning the concerns

of the parents of disabled children. We wish to make the observation that the respondents have been too eager to employ extreme indulgence in circumventing the orders passed by this Tribunal by applying plausible reasonings of their own, making it appear that judicial orders are just scare crows for them. True, administrative authorities have been vested with the power of exercising discretion while taking decisions. But if the discretion is not exercised judiciously and in a derisive manner, courts and tribunals will have to intervene and to set aright the errant administrator.

15 Of course, administrative constraints is a concern which may be a vexing factor for the administrator. That does not mean that in proven and appropriate matters which require compassionate consideration should be ignored altogether. It is worth noticing that while taking Annexure A-6 decision to reject the applicant's request for cancelling his transfer to Pulpalli, the insensitive respondent no.1 observed; "illness of a family member of an employee can not be claimed as a ground for exemption from tenure transfer." Respondent no.1 has simply treated the disability of applicant's child as a mere "illness"! In Annexure A-9 Respondent no.1 was seen exhibiting his proclivity for pedantic interpretation of the statutory provisions and the administrative instructions in Annexure A3 transfer rules and guidelines as well. While noticing that he was taking too much liberty with the discretion we had given to him in Annexure A-7 order to take a decision on Annexure A-8 representation, we are of the view that he has exercised the discretion in an arbitrary and whimsical manner, not in a judicious and conscientious manner in accordance with the policy of law and

extant rules.

16 The special consideration given to the persons with disabilities is in tune with the Constitutional philosophy of our country. Moreover, the special consideration given to the disabled person is a universal mandate too, as can be seen from the United Nations Convention on the rights of Persons with Disabilities 2006. the Convention was ratified by India in October 2007. The special consideration given to the persons with disabilities cannot be left to be exercised by the insensitive administrators. That is the reason why special provisions have been incorporated in the guidelines and the rules pertaining to transfers of employees also.

17. As pointed out above, despite the repeated orders passed by this Tribunal to consider 40% visually impaired condition of the applicant's child as a factor in the matter of transferring the applicant from MDF Elathur to CSC Pulpally, respondent no.1 was gerrymandering his reasonings pegged on to the difficulties faced by the department in finding suitable persons to be accommodated in difficult areas like Pulpally in Wayanad District where the employees from the urban areas are unwilling to work. The attitude of respondent no.1 trying to circumvent the directions of this Tribunal contained in Annexure A-5 and Annexure A-7 orders to take into consideration of the 40% visual impairment of applicant's daughter and also to consider Annexure A-2 certificate issued by the Taluk Headquarters Hospital, Vadakara is nothing but a contumacious act for which we are of the view that he should be taken to task. If respondent no.1 or the department was unhappy with

Annexure A7 and Annexure A-5 orders, they ought to have taken up the matter before the appropriate higher courts. Instead of doing that, after Annexure A-5 and Annexure A-7 orders have attained finality, respondent no.1 was found to be trying to wriggle out from the responsibility of considering the applicant's daughter's disability as a ground for not transferring him to Pulpally. Therefore, we feel that, for the time being, instead of initiating suo motu contempt of court proceedings against him, imposing a cost on the then incumbent of respondent no.1 payable from his own pockets is sufficient.

18 In the light of the above discussion and in the circumstance of this case, we quash and set aside Annexure A-1 order *qua* the applicant and Annexure A-9 communication. We direct the respondents to re-post the applicant at MDF Elathur immediately on receipt of a copy of this order. We further direct the then incumbent of respondent no.1 who has caused to issue Annexure A-9 communication, to pay a cost of Rs.5000/- which shall be deposited in the District Legal Services Authority, District Court Complex, Kozhikode, from his own pocket. This shall be done within one month from the date of receipt of a copy of this order.

19 The Original Application is allowed with the above directions and the order relating to the payment of cost as above. Registry is directed to send a copy of this order to the Secretary, District Legal Services Authority, District Court, Kozhikkode.

(E.K.BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

(U.SARATHCHANDRAN)
JUDICIAL MEMBER

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List of Annexures in O.A

Annexure A1 - True copy of Order No.SGP-6002/Tenure Tfr.Sr.TOA/09-17/26 dated 2.5.2017 of the Assistant General Manager (Admn.) Office of the GMF, BSNL, Kozhikkode

Annexure A2 - True copy of certificate of permanent disability issued by, Taluk Head Quarters Hospital, Vadakara with regard to the visual disability of the daughter of the applicant

Annexure A3 - True copy of Transfer Guidelines of BSNL dated 7.5.2008 as modified on 13.8.2008 and 24.11.2014

Annexure A-4 - True copy of representaion dated 15.5.2017

Annexure A-5 - True copy of order dated 23.5.2017 of the Hon'ble Central Administrative Tribunal, Ernakulam Bench

Annexure A-6 - True copy of Reply No.SGP-6002/2009-17/Vol II/33 dt. 27.5.2017

Annexure A-7 - True copy of Order dated 27.6.2017 of the Hon'ble Central Administrative Tribunal, Ernakulam Bench

Annexure A-8 - True copy of representation dated 5.7.2017

Annexure A-9 - True copy of Reply No.SGP-6002/2009-17/37 dated 11.7.2017

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